

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Evelyn Stoffo : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1971 - 1975.

State of New York
County of Albany

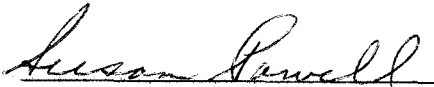
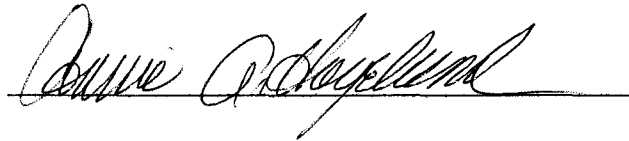
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Evelyn Stoffo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Evelyn Stoffo
23 Rice Ave.
Staten Island, NY 10314

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Evelyn Stoffo : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Business Tax under Article 23 of the Tax Law for :
the Years 1971 - 1975.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Murray Appleman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Appleman
225 Broadway
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
28th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 28, 1983

Evelyn Stoffo
23 Rice Ave.
Staten Island, NY 10314

Dear Ms. Stoffo:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Murray Appleman
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
EVELYN STOFFO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the years 1971	:	
through 1975.	:	

Petitioner, Evelyn Stoffo, 23 Rice Avenue, Staten Island, New York 10314, filed a petition for a redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1971 through 1975 (File Nos. 29921 and 29922).

A Small Claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 25, 1981 at 9:00 A.M. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (Angelo Scoppelito, Esq., of counsel).

ISSUES

I. Whether the period of limitation on assessment of unincorporated business tax begins to run where an individual reflects potential unincorporated business income on her personal income tax return.

II. Whether the State Tax Commission is bound by the decision of a New York City agency determining petitioner not to be subject to its unincorporated business tax on the basis that she was not an independent contractor.

III. Whether petitioner was an employee of rather than an independent contractor for Celebrity Fashion Jewels, Inc. and therefore, her salary and override commission are exempt from unincorporated business tax.

FINDINGS OF FACTS

1. Petitioner timely filed New York State income tax returns for the years 1971 through 1975. Petitioner did not file New York State unincorporated business tax returns for those same years.

2. On February 22, 1980, the Audit Division issued notices of deficiency for payment of unincorporated business tax (1) for the years 1971 through 1974 in the amount of \$5,398.04 (which included \$1,667.94 in penalties and interest) and (2) for the year 1975 in the amount of \$2,400.26 (which included \$592.35 in penalties and interest).

3. For the years in issue, petitioner was zone vice president of Celebrity Fashion Jewels, Inc. ("Celebrity"). Celebrity was in the business of selling costume jewelry primarily through home parties. Celebrity's sales representatives were required to locate individuals willing to give a jewelry party in their home. The sales people would present Celebrity's merchandise at these parties.

4. Petitioner's duties, as zone vice-president, included recruiting and training Celebrity's sales representatives, motivating and directing sales managers within her group and, when directed by Celebrity, travel to and conduct sales seminars. Celebrity had an operational plan which petitioner was required to follow when recruiting sales personnel. Celebrity also provided petitioner with Fashion Show Director and Manager Application forms which set forth certain requirements and standards the applicants must meet and agree to before becoming a Celebrity sales representative. Petitioner was not allowed to deviate from these requirements when recruiting applicants. The president of Celebrity had the right to reject applicants recruited by petitioner.

5. Celebrity paid petitioner a salary plus override commissions. The commissions were based on the amount of sales from the managers and sales

people within her group. Commissions paid were substantially more, for each of the years in issue, than the salary petitioner received from Celebrity.

6. Celebrity provided petitioner with an office and secretary at its main office located at 93 34th Street, Brooklyn, New York. She also maintained an office at her home. Celebrity also provided petitioner with health insurance and she was included in the company's pension, profit sharing and worker's compensation plans.

7. Petitioner was forbidden from representing other firms or promoting other lines of merchandise. She stated that to represent other companies would cause her dismissal from Celebrity.

8. In general, Celebrity allowed petitioner to set her daily work schedule. She stated that her supervisor, the president of Celebrity, was "results-oriented". She was required, however, while traveling for Celebrity or working in the field to report to the president at the Brooklyn Office once or twice a week either by telephone or in person. Petitioner was also required to file a weekly report on the progress of her activities to the president.

9. Celebrity reported petitioner's salary for each of the years in issue on a Wage and Tax Statement wherein federal and state income taxes and FICA tax were withheld. Celebrity reported petitioner's commissions on Federal Form 1099. Taxes were not withheld from said commissions.

10. Petitioner incurred business expenses for such items as promotion, advertising, travel, etc., which were not reimbursed by Celebrity.

11. On September 4, 1975, the New York City Finance Administration issued petitioner a letter which stated, based on the facts submitted by petitioner, that she was not engaged in the conduct of a business for New York City unincorporated business tax purposes.

12. Petitioner contributed to a retirement plan (Keogh Plan) for each of the years 1972 through 1975.

CONCLUSIONS OF LAW

A. That sections 722 and 683(c)(1)(a) of the Tax Law provide that unincorporated business tax may be assessed at any time if an unincorporated business tax return is not filed. There is no provision in the Tax Law which provides for the period of limitation on assessment of unincorporated business tax to begin to run where income potentially subject to such tax is reflected on a New York State personal income tax return. Accordingly, since petitioner did not file unincorporated business tax returns for the years in issue, the notices of deficiency are timely.

B. That the opinion of the New York City Finance Administration that petitioner's activities for Celebrity did not constitute the conduct of a business for New York City unincorporated business tax purposes is not binding upon New York State. The State Tax Commission may arrive at its own conclusions based on the facts as determined by an independent audit or investigation.

C. That the determination of whether services are performed by an individual as an employee or as an independent agent turns upon the degree of direction and control exercised by the employer over the individual. Matter of Greene v. Gallman, 39 A.D.2d 270, aff'd 33 N.Y.2d 778.

D. That Celebrity Fashion Jewels, Inc. exercised sufficient direction and control over petitioner's activities to constitute an employee-employer relationship within the meaning and intent of section 703(b) of the Tax Law. Petitioner was obligated, among other things, to follow Celebrity's operational plan for recruiting sales representatives for the company, to travel at the direction of Celebrity, to train new sales representatives, to motivate and direct sales managers

and to submit a weekly report on her activities to her supervisor. Furthermore, Celebrity provided petitioner with an office, secretary, company forms and company health insurance, pension and profit sharing plans. Accordingly, the income earned by petitioner from her activities for celebrity during the years in issue is not subject to the unincorporated business tax.

E. That the petition is granted and the notices of deficiency dated February 22, 1980 are cancelled.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER